

A M E N D E D
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS

FILED

OCT 18 2004

No. 03-40895
USDC No. 1:02-CV-834
USDC No. 1:99-CR-138-ALL

CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GORDON RAY SIMMONDS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

FILED - CLERK
U.S. DISTRICT COURT
04 NOV - 1 AM 11:30
TX EASTERN - DEATHMONT
BY *[Signature]*

O R D E R:

Gordon Ray Simmonds, Texas state prisoner # 932489, seeks a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 motion in which he challenges his federal conviction of receiving or distributing child pornography, the sentence for which is to run concurrently to the sentence imposed by the Texas state court.

Simmonds argues that the district court erred in dismissing his motion on procedural grounds, without considering whether counsel's ineffective assistance with respect to suppression issues rendered his guilty plea unknowing and involuntary.

Because the issue whether the claimed ineffective assistance directly affected the validity of the waiver or the plea itself was not raised before the district court, this court is without jurisdiction to consider it. Whitehead v. Johnson, 157 F.3d 384, 388 (5th Cir. 1998).

Simmonds also argues that appellate counsel rendered ineffective assistance with respect to suppression issues. He asserts numerous issues in which he argues that the search of this hotel room violated his constitutional rights. He also argues that the district court erred in denying his 28 U.S.C. § 2255 motion without holding an evidentiary hearing. Simmonds has failed to show that jurists of reason would find it debatable whether the 28 U.S.C. § 2255 motion "states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

COA DENIED.



EDWARD C. PRADO
UNITED STATES CIRCUIT JUDGE

